IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

JACK OSWALD, Plaintiff, vs. WATERLOO BOARD OF EDUCATION, Defendant.	No. C02-2050

This matter comes before the court pursuant to the plaintiff's May 27, 2003 motion for partial summary judgment (docket number 11) and the defendant's July 9, 2003 cross-motion for summary judgment (docket number 18). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For the reasons set forth below, the plaintiff's motion is denied and the defendant's motion is granted.

In this case, the plaintiff, Jack Oswald, alleges that the defendant, the Waterloo Board of Education, deprived him of his procedural due process rights during a teacher suspension hearing by denying him his right to confront and examine witnesses who testified against him before the Board. The plaintiff moves for partial summary judgment, arguing: (1) he was deprived of his property interest in his continued employment and income; (2) he was deprived of his fundamental right to be confronted with all adverse evidence against him and to cross-examine available witnesses; and (3) he has a fundamental right to have his

case deliberated by an impartial tribunal. The Board moves for summary judgment arguing the plaintiff's claim fails as a matter of law because his two-day suspension without pay was a de minimis property deprivation that did not implicate constitutional procedural due process concerns and because the plaintiff received all process that was due to him under the Constitution.

Summary Judgment: The Standard

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id.

Statement of Material Facts

The plaintiff is an industrial arts teacher at West High School in Waterloo, Iowa and is employed with the Waterloo Community Schools. On January 9, 2002, three students in the plaintiff's shop class left the classroom without permission and engaged in "skateboarding" on a dolly in a parking lot adjacent to the school. When the students returned to the classroom, the plaintiff lectured them regarding their conduct and its potential for personal injury. In front of other students, the plaintiff placed his hand on the shoulder of two of the students. Michael Allen, an Assistant Principal at the school, was walking through the art hallway when he heard loud screaming noises that he believed sounded like a fight. Mr. Allen entered the industrial arts room where the noise was coming from and observed the plaintiff loudly yelling and screaming at students in his class while he placed his hands on the students' shoulders and allegedly pushed them into their stools.

After meeting with the plaintiff later that day, Mr. Allen prepared a letter of reprimand. In his letter, Mr. Allen stated: "Upon hearing your voice sounding very loud and angry, I entered your room and observed you physically placing your hands on two students' necks and pushing them into their seats while yelling at them." The letter further noted that "this is a direct violation of Waterloo Community Schools Board policy" and that the matter would be reported to the District office for further investigation.

Later that same day, Ray Dial, an Administrative Assistant at Waterloo West High School, received a report of the incident from one of the students involved. Mr. Dial went to the plaintiff's classroom and the plaintiff shared with Mr. Dial a sense of remorse over the fact that the incident had occurred. Mr. Dial also called the student's father and the student's father inquired into police action about the incident.

After school on January 9, 2002, Dr. Gail Moon, Principal of Waterloo West High School, met with the plaintiff. Dr. Moon discussed the seriousness of the incident. The plaintiff offered to transfer to another building. Dr. Moon encouraged the plaintiff to write a statement concerning his side of the incident, which the plaintiff eventually did.

On January 10, 2002, Dr. Moon sent a memo to Dr. Beverly Smith, Associate Superintendent for Human Resources and Equity for Waterloo Community Schools. The memo discussed the course of action to be taken against the plaintiff, including further investigation by Human Resources. Dr. Moon also noted that a Waterloo police officer had reported to her that two parents had contacted him regarding pressing charges and they had subsequently filed a case report. After the incident, Dr. Moon offered to have one of the students go to the nurse, but she reported at the plaintiff's hearing that the student instead went to his doctor with his parents because he claimed he was physically hurt.

The District office referred this matter to Patrick Clancy, Executive Director of Student Supplemental Services for Waterloo Community Schools, to investigate. On January 14, 2002, Mr. Clancy interviewed all persons with information regarding the incident and reviewed the written materials, including those prepared by the plaintiff. Mr. Clancy's report found that "Mr. Oswald used physical force, which was not reasonable based on the situation." Mr. Clancy concluded the plaintiff's conduct violated Waterloo Community School District policy 504.7, Corporal Punishment. The matter was referred back to Dr. Smith and Dr. Moon for appropriate action. A copy of Mr. Clancy's report was provided to the plaintiff and his attorney. The Board's corporal punishment policy allows physical contact only to prevent a safety risk, not as a consequence for behavior.

On January 24, 2002, the plaintiff prepared a complaint against Dr. Moon under the employee complaints procedure provided in Board Policy Number 403.51-R. In his complaint, the plaintiff charged that Mr. Allen did not correctly interpret the school's rules in reprimanding him and that his actions did not violate student abuse or corporal punishment standards. The plaintiff requested that the January 9, 2002 reprimand letter and the January 10, 2002 referral memo from Dr. Moon be removed from his file. He attached his own written narrative of what happened on January 9, 2002 to the complaint. In his narrative, he admitted he "grabbed" one of the students and "pulled him" and that the student resisted

before he sat down. He noted Mr. Allen entered the room as he was "pulling" one of the students toward the stool.

On January 28, 2003, the Waterloo Community School Superintendent, Arlis Swartzendruber, notified the plaintiff that he was in violation of school policy Number 504.7, Corporal Punishment, and he was suspended from his teaching duties for two days without pay. The plaintiff was encouraged to seek anger management assistance.

On January 29, 2002, the plaintiff's attorney wrote Dr. Swartzendruber to appeal the decision. The following day, Dr. Swartzendruber responded and informed the plaintiff's attorney that the request for appeal would be forwarded to Dr. Smith, Steve Powell, the attorney for the School District, and Sharon Miller, the School Board Secretary. Mr. Powell and Dr. Smith were to arrange a hearing time with the plaintiff's attorney and to learn what documents and witnesses the plaintiff would seek at the hearing.

On February 5, 2002, the plaintiff sent his complaint to Dr. Smith for her review as part of his appeal. On March 19, 2002, Dr. Smith wrote to the plaintiff's attorney and indicated the suspension would be upheld. On March 26, 2002, the plaintiff's attorney wrote to Mr. Powell in response to the March 19, 2002 letter from Dr. Smith. The plaintiff's attorney indicated that the plaintiff was appealing the two-day suspension and would like to bypass the next step under the policy, the Superintendent's review, and proceed directly to a hearing before the Board. Mr. Powell accommodated the plaintiff's request and prepared the matter for hearing by arranging for the witnesses the plaintiff requested and by providing the plaintiff with other documentation needed.

The plaintiff received an evidentiary hearing before the Board on April 29, 2002. At the hearing, the plaintiff offered four exhibits: Dr. Smith's March 19, 2002 letter; Mr. Allen's January 9, 2002 reprimand letter; the Board policy for corporal punishment; and Mr. Clancy's investigative report. The plaintiff, one of his students and Mr. Allen testified. Dr. Moon was also present and answered questions from Board members. She specifically noted that the Board policy prevents a teacher from touching a student when the

teacher is angry and pointed to the fact inappropriate conduct was observed by Mr. Allen. Dr. Moon was not questioned by plaintiff's counsel.

At the conclusion of the hearing, and as the plaintiff and his attorney were leaving, the plaintiff's attorney stated, "I am assuming there will be no further testimony provided." Mr. Powell responded, "You can assume what you wish." After the hearing, while the Board was deliberating on the plaintiff's appeal, the Board and school administrators discussed the plaintiff and Dr. Moon, stated, "He said he lost it" and "He wanted to rough them up." Mr. Powell stated, "He admitted being angry, lost control. Jack Oswald admitted to Mike Allen that he 'lost it.'" Mr. Allen stated, "The parents would not have allowed this incident. We should send a message that this is wrong." The school administrators also commented on the Board's policy on corporal punishment. The administrators left after approximately an hour. The Board continued its deliberations for another 45 minutes and then adjourned by unanimous consent. No report of the decision was made in the meeting minutes.

On May 1, 2002, the Board, through its President, Donald Hanson, issued a final decision upholding the plaintiff's two-day suspension without pay and denied the plaintiff's request for reconsideration. The Board concluded that the actions of the school administrators and the disciplinary action taken were reasonable given the facts and circumstances of the case.

On May 7, 2002, the plaintiff's attorney wrote the Board asking for a new hearing based on the plaintiff's understanding that additional statements may have been made by Dr. Moon and others during the deliberations. The letter argued the alleged statements were unfair and suggested the administrators' presence during deliberations was inappropriate. The plaintiff requested an impartial hearing officer and a new hearing.

On May 16, 2002, the Board, again through Mr. Hanson, wrote a letter responding to the plaintiff's counsel's letter. The Board rejected the request for the new hearing,

reaffirmed that it had provided the plaintiff a sufficient opportunity to have his side heard, and concluded that after considering all of the evidence, the decision was final.

Conclusions of Law

Due process claims are generally subjected to a two-part analysis: (1) is the asserted interest protected by the due process clause; and if so, (2) what process is due? Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). In other words, in examining the plaintiff's due process claim, the court must first determine whether a two-day suspension without pay deprived the plaintiff of a property interest and if such a property interest is indeed at stake, the court must then determine whether the manner in which the discipline was imposed satisfied constitutionally mandated protections. Gillard v. Norris, 857 F.2d 1095, 1098 (6th Cir. 1988) (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)). In Matthews v. Eldridge, the Supreme Court wrote, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." Matthews v. Eldridge, 424 U.S. 319, 332 (1976). "The possession of a protected life, liberty, or property interest is thus a condition precedent to the government's obligation to provide due process of law" and where no such interest exists, there is no due process violation. Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 718 (8th Cir. 1995).

Is the Asserted Interest Protected by the Due Process Clause

To establish a due process violation, the plaintiff must first show that he has a protected property interest. Merritt v. Reed, 120 F.3d 124, 126 (8th Cir. 1997) (citing Shands v. City of Kennett, 993 F.2d 1337, 1347 (8th Cir. 1993)). An employee has a property interest in his employment if he has a "legitimate claim of entitlement" to it. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 899 (8th Cir. 1994) (citing Bd. of Regents v. Roth, 408 U.S. at 577). To determine whether an employee enjoys a protected property interest in continued employment, a court must look to state law.

Eddings v. City of Hot Springs, Ark., 323 F.3d 596, 601 (8th Cir. 2003) (citations omitted). A contract may create a property interest. See Brockell v. Norton, 688 F.2d 588, 590-91 (8th Cir. 1982). "A property interest in employment can also be created by implied contract, arising out of customs, practices, and de facto policies." Winegar v. Des Moines Indep. Comm. School Dist., 20 F.3d at 899 (citing Perry v. Sindermann, 408 U.S. 593, 601-02 (1972)). "When such a property interest exists, the employee is entitled to a hearing or some related form of due process before being deprived of the interest." Id. (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)).

Here, the parties agree that the plaintiff has a protected property interest in his employment and in his income by virtue of his continuing contract under Iowa Code §§ 279.13-.19. However, the defendant argues that a two-day suspension without pay is a de minimis property deprivation and therefore does not give rise to due process concerns. Courts have long recognized that de minimis property interests do not trigger procedural due process protections. See Goss v. Lopez, 419 U.S. 565, 575 (1975). Several courts have applied this principle to minor infringements upon property interests. See Pitts v. Bd. of Educ. of U.S.D. 305, 869 F.2d 555, 556 (10th Cir. 1989) (holding that a two-day suspension with pay does not deprive an employee of any "measurable property interest"); Sewell v. Jefferson County Fiscal Court, 863 F.2d 461, 467 (6th Cir. 1988) (finding no due process violation where the plaintiff was demoted without a hearing but subsequently reinstated with full back pay); Hardiman v. Jefferson County Bd. of Educ., 709 F.2d 635, 638 (11th Cir. 1983) (finding one-week suspension with pay was de minimis and did not trigger procedural due process).

The Sixth Circuit Court of Appeals has specifically found that although a routine disciplinary two-day suspension without pay constituted a deprivation of property in theory, it was a de minimis deprivation not deserving of due process consideration. Carter v. W. Reserve Psychiatric Rehab. Ctr., 767 F.2d 270, 272 n. 1 (6th Cir. 1985). In a subsequent case, the Sixth Circuit found that a three-day suspension did not increase the property

deprivation to such an extent that due process protections were triggered. Gillard v. Norris, 857 F.2d at 1098. The Eighth Circuit Court of Appeals has not specifically dealt with the issue of whether such a suspension gives rise to due process concerns. As pointed out by the plaintiff, the Eighth Circuit has held that a four-day suspension and a transfer to another school was a significant deprivation because that case involved "more than a mere suspension." Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d at 900. This case involves a two-day suspension.

This court finds that a two-day suspension without pay does not trigger due process concerns. The plaintiff's lost income for two days is a relatively minor loss. Further, there is no evidence that the plaintiff's benefits, such as his health and life insurance, were affected by his suspension. See Gilbert v. Homar, 520 U.S. 924, 932 (1997). Because the plaintiff received a sufficiently prompt post-suspension hearing and where there is no evidence of interference with the plaintiff's other benefits and no evidence of harm to his reputation, the court finds his two-day suspension constituted a de minimis property deprivation.

What Process is Due

In the event that this court were to conclude that the plaintiff's two-day suspension was a property deprivation of such severity that his due process rights were triggered, the court concludes that the plaintiff received the requisite process to which he was entitled. "The fundamental requirement of due process is the opportunity to be heard at 'a meaningful time and in a meaningful manner.'" Matthews v. Eldridge, 424 U.S. at 333 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). In the termination context, the Supreme Court has found that, at a minimum, due process requires that an employee be given notice of the charges against him and some type of hearing prior to discipline by termination. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 542. The Court concluded that a tenured public employee to whom a post-termination hearing is available is entitled to "oral or written notice of the charges against him, an explanation of the employer's evidence, and

the opportunity to present his side of the story." Id. at 546. The Supreme Court has also held that due process "is a flexible concept that varies with the particular situation." Zinernom v. Burch, 494 U.S. 113, 127 (1990). To determine what process is due in any particular case, a court must weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting Matthews v. Eldridge, 424 U.S. at 335).

The plaintiff argues that school administrators' ex parte communications with the Board deprived him of his procedural due process rights because he was unable to confront and examine those witnesses. It is fundamental to the requirements of the Due Process Clause that a plaintiff have the opportunity to be confronted with all adverse evidence and have the right to cross-examine witnesses. Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981) (citing Greene v. McElroy, 360 U.S. 474, 496-97 (1959)). "Where a party is precluded from exercising this fundamental right, the review procedure is constitutionally defective . . . ." Id. (citing Morgan v. United States, 304 U.S. 1, 22 (1938)).

The plaintiff does not allege that he was not given notice of the charges against him. Rather, he alleges he was not given an opportunity to confront all adverse evidence against him. The plaintiff argues that when the Board began its deliberations, school administrators opposing the plaintiff should have been dismissed from the hearing room. He cites to no case that has imposed this requirement in teacher discipline cases. The plaintiff specifically objects to statements made by Dr. Moon in which she stated that the plaintiff wanted to "rough up" the students and she said "he lost it." The plaintiff argues that because Dr. Moon did not present any testimony in the presence of the plaintiff, he was not able to cross-examine her based on the statements she made to the Board during

deliberations. The plaintiff also objects to statements made by Mike Allen, Beverly Smith, Arlis Swartzendruber, and Steven Powell and argues the statements they made directly related to the reasons given by the Board for the plaintiff's suspension. The Board concedes that school administrators remained in the room after the plaintiff and his attorney left, however, the Board contends that no new testimony was offered. Rather, the comments made were already contained in the record or were completely consistent with it.

The court finds the plaintiff was afforded all the due process he was due. The Eighth Circuit has previously rejected a discharged employee's argument that a university grievance procedure was constitutionally inadequate because it would not have granted her the opportunity to confront or cross-examine witnesses at a post-termination hearing because the procedure still gave the plaintiff a fair opportunity to be heard. Riggins v. Bd. of Regents of Univ. of Neb., 790 F.2d 707, 711 (8th Cir. 1986). In addressing the use of affidavits at an administrative hearing, the Tenth Circuit observed that "whether the Due Process Clause requires that the terminated employee be offered the right to cross-examine or confront witnesses depends upon the significance and nature of the factual disputes at issue." West v. Grand County, 967 F.2d 362, 369 (10th Cir. 1992).

The plaintiff received notice of the investigation into his conduct and he had several meetings with the administration. He presented his own written narrative of the events to the administration. He was notified of his intended discipline and filed his own complaint. He appealed his suspension and the denial of his complaint and proceeded to his hearing before the Board where he was represented by an attorney. He was provided with all the documents considered in his suspension. At his hearing, the plaintiff presented witnesses, exhibits, and arguments to the Board. He could have presented more, but he chose to introduce only four exhibits and call only two witnesses and himself. It should also be pointed out that Dr. Moon was present for the entire hearing and made comments to the Board. The plaintiff knew she was there opposing him and if he thought it would have been beneficial to call her to testify, he could have done so.

The comments made outside the presence of the plaintiff and his attorney were an inconsequential part of the hearing. Plaintiff has not indicated anything that he would have done to further rebut or cross-examine the comments that were consistent with the proceeding in the plaintiff's presence. He has not attempted to show that had he been afforded the opportunity to rebut those comments, the outcome of the hearing would have been different. Further, after reviewing the hearing transcript, this court finds that none of the statements made to the Board outside the presence of the plaintiff could be viewed as additional "testimony." All of the statements were either contained in the record or were consistent with what was in the record. Many of the statements the plaintiff objects to were nothing more than comments regarding the Board's corporal punishment policy. The plaintiff was given ample opportunity to present his side of the story at the hearing and he could have questioned any of the school administrators. The plaintiff was afforded a fair opportunity to voice his version of events and respond to the charges against him. He got what he was entitled to.

The plaintiff finally asserts he was entitled to an impartial tribunal. Due process requires a fair trial with an unbiased decision maker. Withrow v. Larkin, 421 U.S. at 46-47. An allegation of bias on the part of administrative adjudicators:

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness [the situation complained of] poses such a risk of actual bias or prejudgment that practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. The Seventh Circuit Court of Appeals has found that a process under which the school board's attorney who served as prosecutor also served as an advisor to the board during their closed-door deliberations did not overcome this "presumption of objectivity." Lamb v. Panhandle Cmty. Sch. Dist. No. 2, 826 F.2d 526, 530 (7th Cir. 1987). In that case, the principal and the school superintendent testified against the appellant at the hearing and also

advised the board during their closed-door deliberations. Id. The court held that the "combination of an advisory function with a hearing participant's prosecutorial or testimonial function does not create a per se facially unacceptable risk of bias." Id. at 529. This court also finds that the mere fact that school administrators made ex parte comments to the Board is insufficient to rebut the presumption of objective adjudication that a school board is entitled to in the absence of compelling evidence to the contrary. Those of us who routinely work in courts are frequently surprised or disappointed by the informality of administrative tribunals. They are often run by persons untrained in the law. The informality of these tribunals does not mean they are unfair. The plaintiff is simply not entitled to as many procedural protections as he would receive if he had been accused of a crime. The fact that school administrators made ex parte comments to the Board does not indicate that the Board refused to consider the plaintiff's version of events and the evidence he presented. The plaintiff has not overcome the presumption of integrity that the law gives to the Board. The proceedings before the Board were consistent with the Due Process Clause.

Upon the foregoing,

IT IS ORDERED that the plaintiff's May 27, 2003 motion for partial summary judgment (docket number 11) is denied and the defendant's July 9, 2003 cross-motion for summary judgment (docket number 18) is granted. This matter is dismissed.

September 22, 2003.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT